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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 828

JAMES A. HERBERT, TRUSTEE,
Petitioner,

v.

WILLIAM F. SULLIVAN ET AL,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The amended opinion of the District Court for the District of New Hampshire, filed March 17, 1941 (R. 12), is printed at R. 12 and is reported at 37 F. Supp. 468. The opinion of the Circuit Court of Appeals for the First Circuit, filed on November 14, 1941 (R. 40), is printed at R. 41 and is not yet reported.

JURISDICTION

The judgment sought to be reviewed was entered November 14, 1941 (R. 45). Petition for certiorari was filed December 31, 1941. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (c. 229, §1, 43 Stat. 938).

QUESTION PRESENTED

1. Whether any question of federal law is involved, and if so, whether it requires any decision by this Court.

2. Whether the decision below that an action cannot be maintained on the express promise in an *ultra vires* contract is in conflict with applicable decisions in Massachusetts.

STATUTE INVOLVED

It is urged by petitioner that Section 34 of the Federal Judiciary Act of September 24, 1789 (c. 20, §34, 1 Stat. 92) is involved. That statute provides:

> "The laws of the several States, except when the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

STATEMENT

The petitioner, trustee in bankruptcy of Commercial Brewing Company, a Massachusetts corporation, brought an action in the District Court for the District of New Hampshire against the respondents, executors of the estate of John D. Sullivan (late of Nashua, New Hampshire), on a promissory note in the amount of $5,000 payable to the bankrupt. Among the assets of the estate, of which the respondents were appointed executors by the New Hampshire Probate Court in February, 1932 (R. 12), were 430 shares of stock in the Commercial Brewing Company (R. 14, 22). As the decedent had operated this company prior to his death (R. 34, 14) and the company was very prosperous for several years prior to 1935 (R. 22), one of the executors went to Mr. Doherty, presi-

dent of the company, in October, 1935 to see if a dividend could be declared on the stock in order to provide the estate with money to pay its bills (R. 22, 32, 14). Mr. Doherty owned seventy per cent of the stock of the company and was opposed to the declaration of a dividend (R. 19, 22, 32). And he was not then buying any of the stock, although he was the only market for it (R. 33-34). The affairs of the estate were discussed, the difficulty of liquidating its assets appreciated and its need for cash to pay outstanding bills recognized (R. 33, 34). Mr. Doherty stated his willingness to help and agreed to furnish the estate with an amount sufficient for its needs, $5,000 (R. 33). In order to have a record, Mr. Doherty desired the transaction to be handled by the estate giving its note (R. 33, 34) with 100 shares of stock in the company as collateral which, valued by him as worth $100 a share, he considered more than ample to cover the corporation (R. 22-23, 24). Accordingly, the company gave a check payable to the John D. Sullivan Estate (R. 23), and took its note secured by the 100 shares of stock (R. 3, 16, 20, 29, 33). The note was payable at the office of the company in Massachusetts. It is undisputed that it was *ultra vires* the company to lend money (Petition 4; R. 43). The money was used to pay debts of the estate (R. 14, 24) and the executors personally received no benefit (R. 14, 16, 24). No interest was ever paid on the note, and no demand for any payment was made until nearly five years after the note was given when the company got into financial difficulties and went into bankruptcy (R. 13, 14, 20).

The petitioner brought his action on the note seeking to hold the respondents personally liable. The District Court gave judgment for the respondents (R. 16). And the court below affirmed on the ground that the present action on the express promise could not be maintained under Massachusetts law governing *ultra vires* transactions (R. 43).

ARGUMENT

It is contended by the Petitioner that when a federal court has to decide a question of state law on which there are no state precedents squarely in point, there is presented the federal question of whether the court shall decide what the state court would determine the law to be or shall exercise its own judgment as to what the state law is—a question in the decision of which, it is claimed, some circuit courts of appeal are in conflict. These contentions cannot be supported. The alleged federal question is not presented in this case; and even if it were, as the guiding principle has already been clearly established by this Court and the alleged conflict between Circuits is imaginary rather than real there is no occasion for review by this Court. The only question that is really presented is a point of Massachusetts law on *ultra vires* contracts on which there is no state court decision squarely in point, but in the determination of which the decision by the court below is plainly in conformity with settled principles of Massachusetts law.

I.

No Question of Federal Law is Presented; and Even if There Were, There is No Occasion for Review By This Court.

A. *The Inquiry into Massachusetts Law is Governed by the New Hampshire Law of Conflict of Laws and not by Section 34 of the Judiciary Act.*

The present action was brought in the federal court in New Hampshire. The decision of the case, therefore, under Section 34 of the Judiciary Act, required the application of New Hampshire law. And the New Hampshire law required to be applied includes its law of the conflict of laws. *Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.,* 313

U. S. 487; *Griffin* v. *McCoach*, 313 U. S. 498; *Sampson* v. *Channell*, 110 F. (2d) 754, 759-62 (C. C. A. 1st), *cert. den.* 310 U. S. 650. In the application by the court below of the New Hampshire law of conflict of laws referring the decision of the point in issue to Massachusetts law (*New York Life Ins. Co.* v. *McKellar*, 68 N. H. 326, 330, 44 Atl. 516, 518) Section 34 of the Judiciary Act was admittedly complied with. What the duty of the court was in seeking to ascertain Massachusetts law and what the nature of its inquiry was to be in the absence of a Massachusetts precedent directly in point clearly are matters governed by the content of the New Hampshire law of conflict of laws. And no question is raised on that score. To attempt to raise a federal question under Section 34 of the Judiciary Act is to misapprehend the force of that statute. That statute cannot determine that duty and the nature of that inquiry; it required the application of New Hampshire law, but it does not and cannot operate further so as to prescribe the content of that law. *Erie R. R.* v. *Tompkins*, 304 U. S. 64.

Accordingly, even if the present case involved a question as to the manner in which Massachusetts law should be ascertained in the absence of a governing precedent, the question is not a federal one but a very narrow one in the application of the law of conflict of laws of New Hampshire alone.

B. *Even if a Federal Question under Section 34 of the Judiciary Act were involved in this Case, This Court Has Already Established the Applicable Principle and There is No Conflict Among the Circuits.*

The function of a federal court in deciding a non-federal question is settled and plain. It is no different in a case where there is no state law directly in point than in a case where there is. The guiding principle is clearly

and succintly stated in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, at 209:

> "The * * * federal court must * * * apply the entire body of substantive law governing an identical action in the state courts."

A federal court is to decide a case as nearly as possible in conformity with the decisions of the state court. See *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483-84; *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 468-69; *Wichita Royalty Co.* v. *City National Bank*, 306 U. S. 103, 107; cf. *Moore* v. *Illinois Cen. R. R.*, 312 U. S. 630, 633; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 237; *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169, 180. Indeed, the latest state court determination must be followed even if it overrules an earlier state court decision which has been applied below by the federal district court. *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538.

The duty thus clearly established is not "difficult or strange". *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 209. As in the case of matters known as "local" law before the *Erie* case, or of the construction of a state statute, the duty of the federal court is "in every case to ascertain from all the available data what the state law is". *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 237. The available data includes not only considered dicta (*Hawks* v. *Hamill*, 288 U. S. 52) but "compelling inferences or logical implications from other related adjudications and considered pronouncements" (*Yoder* v. *Nu-Enamel Corp.*, 117 F. (2d) 488, 489 (C. C. A. 8th); see *Stoner* v. *New York Life Ins. Co.*, 311 U. S. 464, 469; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 239; *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 484) of the state courts. It also includes any material to which the state court would resort for help in reaching a decision such as decisions elsewhere and the general principles of the

common law. See *Burns Mortgage Co.* v. *Fried*, 292 U. S. 487, 496.

If, therefore, any doubt ever existed as to the guiding principle in the decision of matters within the scope of the *Erie* case when there is no state decision directly in point, that doubt has now been dispelled. And if a conflict between the various circuits did exist, it is clear that the course followed by the court below of deciding the case as the state court would decide the same case —on the basis of the relevant data of state law—is the correct one.

There is in fact, however, in cases where there is no state law in point on the matter in issue, no doubt or conflict among the several circuits and no departure from the guiding principles already established. It is uniformly recognized by the several circuit courts of appeal, including those mentioned in the Petition and in later cases than those there cited, that the federal court is to look to such data on state law as is available and to any other relevant data. *Yoder* v. *Nu-Enamel Corp.*, 117 F. (2d) 488, 489 (C. C. A. 8th); *Princess Garment Co.* v. *Fireman's Fund Ins. Co.*, 115 F. (2d) 380, 383 (C. C. A. 6th); *Crab Orchard Impv. Co.* v. *Chesapeake & O. Ry.*, 115 F. (2d) 277, 279-280 (C. C. A. 4th), *cert. den.* 312 U. S. 702; *Equitable Life Assur. Soc.* v. *First Nat. Bank*, 113 F. (2d) 272, 273 (C. C. A. 5th); *Schwager* v. *Schwager*, 109 F. (2d) 754, 756, 759 (C. C. A. 7th); *Malloy* v. *New York Life Ins. Co.*, 103 F. (2d) 439, 445 (C. C. A. 1st), *cert. den.* 308 U. S. 572. In the absence of a governing precedent in the state decisions, the federal court must necessarily decide the case according to its own judgment as to what the state law is. But, no different rule is applied by the court which says it is exercising its independent judgment in the light of applicable principles of state law than by the court which says it is deciding the case the way the state court would decide it. This is illustrated by the use of different language by the same court. Com-

pare majority opinion below with *Malloy* v. *New York Life Ins. Co.*, 103 F. (2d) 439, 445 (C. C. A. 1st), *cert. den.* 308 U. S. 572; *Equitable Life Assur. Soc.* v. *First Nat. Bank*, 113 F. (2d) 272, 273 (C. C. A. 5th) with *DeLong* v. *Jefferson Standard Life Ins. Co.*, 109 F. (2d) 585, 586 (C. C. A. 5th), *cert. den.* 310 U. S. 635. The difference in words used by various judges, as in the opinions below, is one of form, not of substance. The difference is not in the rule followed, but only in the rhetoric used to express the same rule.

As the court below followed the guiding principle already established by this Court and there is no conflict among the several circuits, no occasion for any decision by this Court is presented. Moreover, no more precise rule than the principle already laid down can be formulated for the guidance of lower federal courts in cases where there is no state law in point. What the conclusion as to state law will be in any case must depend upon the nature of the relevent data available in that particular case. The strength of dicta, inferences or implications or the force of analogies found in state authorities and the weight to be given general common law principles or decisions elsewhere will vary with each case presented. No general formula can establish which of the available data will or should be most persuasive in the ascertainment of state law in any given case, as to which even within the same court, as in the court below, opinions may differ. To prescribe such a formula would be at variance with the established nature of the common law judicial process.

II.

The Decision Below Was in Conformity with Massachusetts Law of Ultra Vires Contracts.

The petitioner brought his action on the express promise to pay, seeking to hold the respondent executors personally liable for the loan made to the estate. Massachusetts has strictly adhered to the principle that an *ultra vires* contract is void. Accordingly, no action on the express promise of *either* party to the transaction has been allowed; recovery is allowed only in implied contract on the basis of benefit received by the defendant. *E. g., Morville* v. *American Tract Society,* 123 Mass. 129; *Nowell* v. *Equitable Trust Co.,* 249 Mass. 585, 599-603; *National Shawmut Bank* v. *Citizens National Bank,* 287 Mass. 329, 335-337.

The cases relied upon by petitioner establish no contrary rule. In the cases cited either the transaction was not *ultra vires* (*Chester Glass Co.* v. *Dewey,* 16 Mass. 94, 101; *Old Colony R.R.* v. *Evans,* 6 Gray, 25, 38-39) or the defendant could not rightly deny liability for the "value" (compare "price") of the goods actually received by him for which he was being sued (*Chester Glass Co.* v. *Dewey,* 16 Mass. 94, 101; *Slater Woolen Co.* v. *Lamb,* 143 Mass. 420, 421-422), or the *ultra vires* act sought to be set up was the acquisition by the corporation in a transaction with another than the defendant of property involved in the action by the corporation against the defendant, a defense properly denied (*National Pemberton Bank* v. *Porter,* 125 Mass. 333; see also *Davis* v. *Old Colony R. R.,* 131 Mass. 258, 271[1]). In *McLean* v. *Side-*

[1]It is to be noted that the quotation at the top of page 12 of the Petition is not, as stated, found in *Old Colony R. R.* v. *Evans,* 6 Gray, 25, or made with respect to "an *ultra vires* contract for the sale of land" as alleged, but is found in *Davis* v. *Old Colony R. R.,* 131 Mass. 258, 274 and constitutes comment on section 153 in *Angell & Ames, Corporations* dealing with the case of an agreement by a corporation to sell land to the defendant which it had acquired *ultra vires* from another.

bottom, 277 Mass. 158, where a corporation sued for money loaned, the defendant did not set up *ultra vires*, and the holding accordingly was that the defense was not available. And the comments of the court on the *ultra vires* question represent no departure from established principles. As the defect in the plaintiff's declaration for money lent had been cured by the addition of a count for money had and received and as it had been established by the judgment below that the defendant had received benefit, the court rightly said, under well settled rules requiring disposition of cases on appeal on the basis of the substantial rights of the parties (Mass. G. L. (Ter. Ed.) c. 231, §132), that no defect of substance was shown which at *that* stage of the case required a reversal. By relying upon the principle stated in *Nims* v. *Mount Hermon Boys' School*, 160 Mass. 177, 179, 180, the Court makes clear that the basis of recovery by a corporation which has lent money *ultra vires* is not the enforcement of an express promise but " 'something in the nature of an equitable estoppel' " so as to avoid the injustice that " 'one who had received the benefits of such a contract might retain them and leave the other party without remedy' " (277 Mass. at 160). And that it was not in any way intended in the *McLean* case to depart from established principles is made doubly clear by the court's statement (at p. 160):

> "The principles governing the rights of the parties are set forth at length in *Nowell* v. *Equitable Trust Co.*, 249 Mass. 585, 600-603, where numerous cases are collected."

In the *Nowell* case, after quoting the "just and salutary principle" stated in the *Nims* case, above referred to, the court, speaking through the same justice as in the

McLean case, clearly states the Massachusetts law governing here (p. 601):

> "It [that principle] is applicable to cases where the corporation setting up the defence of *ultra vires* has received property or gain through reliance by others upon its own conduct and thereafter seeks to retain the advantage it thus has secured by interposing as a shield its unlawful conduct. It is applicable also to cases *where the corporation sues to recover compensation for property or gain transferred by it* to a defendant who tries to escape just responsibility by setting up *ultra vires* conduct of the corporation. That path to avoid payment for what he has received is closed to such a defendant. . . . That principle is at bottom that, when in equity and good conscience one has property without right which ought to go to another, he cannot retain it. *The action is not on the express ultra vires contract but on an implied contract to return or make compensation for property or money which he has no right to retain.*" (emphasis supplied)

Also see *National Shawmut Bank* v. *Citizens National Bank*, 287 Mass. 329, 337.

The court below, therefore, correctly concluded, it is submitted, that under established principles of Massachusetts law the present action on the express promise cannot be maintained. The court did not pass on other remedies open to the Petitioner, but the present action seeking to impose personal liability upon the respondents must in any case be denied, since admittedly they received no personal benefit, and, as held by Shaw, C. J., in *Jefts* v. *York*, 10 Cush. (Mass.) 392, 395 and Holmes, J., in *Grafton Bank* v. *Wing*, 172 Mass. 513, 515, an executor or another acting in a representative capacity is not to be held personally liable when there is no intent he should be, the

clear understanding of all parties here (R. 16, 29, 32, 33, 35), as Petitioner admits (R. 19, 20). See also *Lawrence* v. *Toothaker,* 75 N. H. 148, 71 Atl. 534.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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